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 17 GARRY NEWMAN

18 **UNITED STATES DISTRICT COURT**

19 **DISTRICT OF NEVADA**

20 RIGHHAVEN, LLC,

21 Plaintiff,

22 v.

23 GARRY NEWMAN, an individual; and  
 24 FACEPUNCH STUDIOS LTD., a limited  
 25 company formed under the laws of Great  
 26 Britain,

27 Defendants.

28 Case No.: 2:10-cv-01762-JCM -PAL

**DEFENDANT'S RESPONSE IN  
 OPPOSITION TO PLAINTIFF'S  
 MOTION FOR RECONSIDERATION OF  
 ORDER DISMISSING COMPLAINT  
 AGAINST GARRY NEWMAN**

29 **MEMORANDUM OF POINTS AND AUTHORITIES**

30 Defendant Garry Newman ("Newman") responds in opposition to the Motion for  
 31 Reconsideration that Plaintiff Righthaven, LLC ("Righthaven") filed, seeking to set aside the  
 32 Court's Order Dismissing the Complaint against Newman.<sup>1</sup> Under Local Rule 7-2(b), the Court  
 33 properly granted Newman's Motion to Dismiss based on Righthaven's failure to file a response.

34  
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 36  
 37 <sup>1</sup> In its First Amended Complaint, Righthaven has added as a defendant Facepunch Studios Ltd., a  
 38 limited company formed under the laws of Great Britain. Righthaven has not served process on  
 39 Facepunch, and this Response is filed solely on behalf of Newman.

1           As Righthaven admits in its Motion for Reconsideration, its response to Newman's  
 2 Motion to Dismiss was due July 15, 2011. See Doc. 23 at p. 2. Righthaven asserts that it filed its  
 3 First Amended Complaint on July 15, 2011. Id. Righthaven also asserts that its First Amended  
 4 Complaint constitutes a response to the Motion to Dismiss. Both assertions are misleading. First,  
 5 the Court's CM-ECF stamp across the top of Righthaven's First Amended Complaint shows it  
 6 was not filed until July 16, 2011. See Doc. 21. Second, it was improper for Righthaven to file its  
 7 First Amended Complaint "as of right" under Rule 15(a), since the amended complaint is largely  
 8 based on new transactions and occurrences that took place after the filing of the original  
 9 complaint, namely Righthaven's second amendment to the underlying Strategic Alliance  
 10 Agreement with Stephens Media, dated July 7, 2011, on which Righthaven claims to base its  
 11 standing. Accordingly, Righthaven's "amended complaint" is actually a "supplemental  
 12 pleading," which required permission from the Court and notice to Newman prior to its filing,  
 13 under Rule 15(d).

14           "The disposition of a motion for reconsideration is within the district court's discretion."  
 15 U.S. E.E.O.C. v. Scolari Warehouse Markets, Inc., 488 F. Supp. 2d 1117, 1142 (D. Nev. 2007)  
 16 (denying motion for reconsideration and citing Bliesner v. Commc'n Workers of Am., 464 F.3d  
 17 910, 915 (9th Cir.2006)). Similarly, a district court's dismissal of a complaint pursuant to its  
 18 local rules is reviewed on appeal for an abuse of discretion. Ghazali v. Moran, 46 F.3d 52, 53  
 19 (9th Cir. 1995) (quoting United States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979)). "Only in  
 20 rare cases will [an appellate court] question the exercise of discretion in connection with the  
 21 application of local rules." Id.

22           Righthaven's failure to timely respond to Newman's Motion to Dismiss was only one of  
 23 the grounds the Court considered in granting the dismissal. As explicitly stated in the Order, the  
 24 Court also weighed five factors: "(1) the public's interest in expeditious resolution of litigation;  
 25 (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public  
 26 policy favoring disposition of cases on their merits; and (5) the availability of less drastic  
 27 sanctions." See Order (Doc. 22) at 1 (quoting Ghazali, 46 F.3d at 53). Reconsideration should be  
 28 denied given the Court's consideration of the above factors, Righthaven's failure to file any

1 response to the Motion to Dismiss, the Court's granting dismissal without prejudice, and  
 2 Righthaven's improper filing of an Amended Complaint as of right when it was required to seek  
 3 permission.

4 Here there is no need for the Court to reconsider its Order granting Newman's Motion to  
 5 Dismiss. The Order granted the dismissal without prejudice, which would have allowed  
 6 Righthaven to file a new complaint against Newman. Righthaven failed to take advantage of the  
 7 opportunity to file an amendment as of right, and instead filed a supplemental pleading without  
 8 permission, as discussed above. Righthaven's 21-day period under Rule 15(a)(1)(B) has since  
 9 expired. Nevertheless, contemporaneous with the filing of this Response, Newman is filing a  
 10 Motion to Dismiss Righthaven's improperly labeled "First Amended Complaint," to address the  
 11 substantive flaws in the Complaint – the lack of subject matter jurisdiction and lack of personal  
 12 jurisdiction.

13 DATED this 1<sup>st</sup> day of August, 2011.

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**CERTIFICATE OF SERVICE**

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on the 1<sup>st</sup> day of August, 2011, the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING COMPLAINT AGAINST GARRY NEWMAN** was served via electronic service to the address shown below:

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